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301 NLRB No. 79

D--1750
Detroit, MI

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

H.P.A., INC.	Case 7--CA--30396,
KINGSWAY PURCHASING, INC.	~~Case~~ 7--CA--30397, and
ELECTRO-KING, INC.	~~Case~~ 7--CA--30398

and

AMALGAMATED CLOTHING AND TEXTILE
WORKERS INTERNATIONAL UNION, AFL--CIO

DECISION AND ORDER

By Members Devaney, Oviatt, and Raudabaugh

Upon charges filed by the Union, on April 3, 1990,[1] the General Counsel of the National Labor Relations Board issued a consolidated complaint against Respondents Kingsway Purchasing, Inc. (Kingsway), Electro-King, Inc. (Electro-King), and H.P.A., Inc. (H.P.A.), alleging that they have violated Section 8(a)(5) and (1) of the National Labor Relations Act. Although properly served copies of the charges and consolidated complaint, the Respondents have failed to file an answer.

On August 15, the General Counsel filed a Motion for Default Summary Judgment. On August 17, the Board issued an order transferring the proceedings to the Board and a Notice to Show Cause why the motion should not be granted. The Respondents did not file a response. The allegations in the motion are therefore undisputed.

[1] All dates are 1990, unless otherwise indicated.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Default Summary Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. The consolidated complaint states that unless an answer is filed within 14 days of service, ''all of the allegations in the Consolidated Complaint shall be deemed to be admitted true and may be so found by the Board.''

The undisputed allegations in the Motion for Default Summary Judgment disclose that on May 18, 1990, the Acting Regional Director issued and served the consolidated complaint on the Respondents and on the Respondents' trustee-in-bankruptcy.[2]

On May 25 the attorney for the trustee-in-bankruptcy sent a letter to the Acting Regional Director advising, among other things, that Kingsway had filed for protection under Chapter 11, the bankruptcy case had been converted to one under Chapter 7, and that Douglas S. Ellman had been appointed interim trustee. On May 30 the Deputy Regional Attorney responded by letter and specifically invited the trustee-in-bankruptcy to answer the consolidated complaint. Neither the Respondents nor the trustee-in-bankruptcy filed an answer to the consolidated complaint.

On June 13 the Acting Regional Attorney informed the Respondents, through their trustee-in-bankruptcy, that if an appropriate answer was not filed by June 27 a default judgment would be sought.

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[2] About October 1986, the Respondents filed for protection under Chapter 11 of the Bankruptcy Code with the Bankruptcy Court of the Eastern District of Michigan. About May 7, 1990, the Respondents' bankruptcy was converted to a Chapter 7 liquidation.

By letter dated June 19, the attorney for Arthur Stuart, president of the Respondent corporations, stated that ''Mr. Stuart has absolutely no intention of responding on behalf of these responding corporations to these Complaints.'' The letter further stated that the corporations were subject to Chapter 7 proceedings in bankruptcy and that an ''automatic stay'' was in effect.

In letters dated June 25 and July 20 sent to Stuart's attorney, the Regional Office advised the Respondents that the ''automatic stay'' provision of Section 362 of the Bankruptcy Code does not bar the litigation of the complaint. The July 20 letter reiterated that without the filing of an answer a default summary judgment would be pursued.

Neither the Respondents nor their trustee-in-bankruptcy has filed an answer, a request for an extension of time to file an answer, or any document purporting to be an answer.

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Default Summary Judgment.

On the entire record, the Board makes the following

Findings of Fact

I. Jurisdiction

Respondents Kingsway, Electro-King, and H.P.A. are corporations duly organized under, and existing by virtue of, the laws of the State of Michigan. Kingsway maintains its principal office at 2770 Park Avenue, in Detroit, Michigan. Kingsway is engaged in the leasing of space in various buildings, including Kingsway stores located at 11950 East Warren, Detroit, Michigan; 15401 Grand River, Detroit, Michigan, the Greenfield store; and 10735 Grand River, Detroit, Michigan, the Oakman store; and through its subsidiaries is engaged in the retail sale of merchandise.

Electro-King, a wholly owned subsidiary of Kingsway, maintains its principal office at the 2770 Park Avenue facility. Electro-King is engaged in the retail sale of merchandise, including linens, pets, jewelry, automotive supplies, electronics, and home furnishings, through leased departments within the Warren, Greenfield, and Oakman stores.

H.P.A., a wholly owned subsidiary of Electro-King, maintains its principal office at the 2770 Park Avenue facility. H.P.A. is engaged in the retail sale of merchandise, including housewares, hardware, and paint, through leased departments within the Warren, Greenfield, and Oakman stores.

During the year ending December 31, 1989, a representative period, Kingsway, in the course and conduct of its business operations, had gross revenues in excess of $500,000, and derived revenues in excess of $50,000 from the leasing of space to corporations located outside the State of Michigan, including Masters, Inc. of New York; Morris Shoe Company, Inc. of Massachusetts; and Boston Distributors, Inc. of Ohio.

During the year ending December 31, 1989, a representative period, Electro-King, in the course and conduct of its business operations, had gross revenues in excess of $500,000, and purchased and caused to be transported and delivered to its Michigan facilities jewelry, home furnishings, automotive supplies, and other goods and materials valued in excess of $60,000, of which goods and materials valued in excess of $50,000 were transported and delivered to its Michigan facilities directly from points located outside the State of Michigan.

During the year ending December 31, 1989, a representative period, H.P.A., in the course and conduct of its business operations, had gross revenues in excess of $500,000, and purchased and caused to be transported and delivered to its Michigan facilities housewares, paints, and other goods and

materials valued in excess of $60,000, of which goods and materials valued in excess of $50,000 were transported and delivered to its Michigan facilities directly from points located outside the State of Michigan.

Respondents Kingsway, Electro-King, and H.P.A. have been affiliated business enterprises with common officers, ownership, directors, management, and supervisors, who have formulated and administered a common labor policy affecting employees of all the operations, and they have shared common premises and facilities and have provided services for and to each other. The Respondents constitute a single integrated business enterprise and a single employer within the meaning of the Act.

We find that the Respondents are an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. The Unit and the Union's Representative Status

Since at least 1980, the Union has been the designated, exclusive collective-bargaining representative of the employees in the bargaining unit described below and, since that time, the Respondents have so recognized the Union. That recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective from February 1, 1990, to January 31, 1993.

Since at least 1980, the Union, by virtue of Section 9(a) of the Act, has been, and is, the exclusive representative of the employees in the bargaining unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

The following employees of the Respondents constitute a unit appropriate for bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time employees, employed by the Respondents at their Warren, Grand River/Greenfield and Grand River/Oakman stores, including employees in all leased and licensed departments within these stores; but excluding store managers, assistant store managers, office managers, receiving and marking room managers, management trainees, professional employees, guards and supervisors as defined in the Act.

B. The Refusals to Bargain

The collective-bargaining agreements described above provide, inter alia, for (a) pro rata vacation; (b) sick days and personal days; (c) pension contributions to the Amalgamated Department Store and Retail Employees Retirement Income Plan; (d) health and sickness insurance contributions to the Amalgamated Department Store and Retail Employees Insurance Fund and the Amalgamated Social Benefits Association; (e) remittance to the Union of dues and initiation fees withheld from employees' paychecks pursuant to dues-checkoff authorizations; and (f) severance pay in the event of bankruptcy.

Since about October 3, 1989, and continuing to date, the Respondents have ceased remitting dues and initiation fees withheld from employees' paychecks to the Union.

Since about January 1, 1990, and continuing to date, the Respondents have discontinued making contributions on behalf of their employees in the bargaining unit to the Amalgamated Department Store and Retail Employees Retirement Income Plan.

Since about January 1, 1990, and continuing to date, the Respondents have discontinued making contributions on behalf of their employees in the bargaining unit to the Amalgamated Department Store and Retail Employees Insurance Fund and the Amalgamated Social Benefits Association.

The Respondents permanently closed the Warren store about March 17; the Greenfield store about March 21; and the Oakman store about March 31, 1990. The Respondents engaged in this conduct without prior notice to the Union and

without having afforded the Union an opportunity to engage in collective bargaining with respect to the effects of the closings on bargaining unit employees at a time when bargaining could have been meaningful.

Since the dates set forth above, the Respondents have failed and refused to pay contractually mandated pro rata vacation, sick days, and personal days to their unit employees.

On March 30 and on April 5, 1990, the Union requested that the Respondents furnish it with information concerning the status of the stores and their prospects for continued operation. This information was necessary for, and relevant to, the Union's performance of its function as the exclusive collective-bargaining representative of the unit. On March 30, 1990, and at all times prior to April 18, when the requested information would have been meaningful, the Respondents failed and refused to furnish the requested information.

Since about May 7, 1990, the Respondents have failed and refused to pay contractually mandated severance benefits to their unit employees.

By engaging in the conduct described above, the Respondents have committed unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

Conclusions of Law

1. By discontinuing contributions on behalf of their unit employees to the Amalgamated Department Store and Retail Employees Retirement Income Plan since about January 1, 1990; by discontinuing contributions on behalf of their unit employees to the Amalgamated Department Store and Retail Employees Insurance Fund and the Amalgamated Social Benefits Association since about January 1, 1990; and by ceasing to remit dues and initiation fees withheld

from employees' paychecks to the Union since about October 3, 1989, the Respondents violated Section 8(a)(5) and (1) of the Act.

2. By permanently closing the Warren store about March 17, the Greenfield store about March 21, and the Oakman store about March 31, 1990, without prior notice and without affording the Union an opportunity to bargain with respect to the effects of the closings on the unit employees, at a time when bargaining could have been meaningful, the Respondents have violated Section 8(a)(5) and (1) of the Act.

3. By failing and refusing to pay contractually mandated pro rata vacation, sick days, and personal days to the unit employees at the above stores, the Respondents have violated Section 8(a)(5) and (1) of the Act.

4. By failing and refusing to pay contractually mandated severance benefits to the unit employees since about May 7, 1990, the Respondents have violated Section 8(a)(5) and (1) of the Act.

5. By failing and refusing to furnish the Union with the requested information, the Respondents have violated Section 8(a)(5) and (1) of the Act.

These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondents have engaged in certain unfair labor practices, we shall order them to cease and desist and to take certain affirmative actions designed to effectuate the policies of the Act.

We shall order the Respondents to make whole unit employees for any losses they may have suffered as a result of the Respondents' failure to adhere to the terms of the collective-bargaining agreement, Ogle Protection Service, 183 NLRB 682 (1970), with interest to be computed in the manner prescribed in New Horizons for the Retarded, 283 NLRB 1173 (1987).

We shall also order the Respondents to make the required pension contributions to the Amalgamated Department Store and Retail Employees Retirement Income Plan, and health and sickness insurance contributions to the Amalgamated Department Store and Retail Employees Insurance Fund and the Amalgamated Social Benefits Association that they failed to make.[3]

The Respondents shall also make whole unit employees for any loss of benefits caused by their failure to make these required fund contributions and to reimburse employees for any expenses ensuing from the Respondents' unlawful failure to make the contributions, as set forth in Kraft Plumbing & Heating, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), with interest as provided in New Horizons for the Retarded, supra.

We shall also order the Respondents to remit to the Union dues and initiation fees deducted from the employees' wages, with interest as provided in New Horizons, supra.

We shall also order the Respondents to remit to the employees their severance benefits, with interest as provided in New Horizons, supra.

We shall also order the Respondents to provide the information requested by the Union.

With respect to the Respondents' unlawful failure to bargain with the Union about the effects of the decision to close their stores, the bargaining unit employees have been denied an opportunity to bargain through their collective-bargaining representative at a time when the Respondents might

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[3] Because the provisions of employee benefit agreements are variable and complex, the Board does not provide at the adjudicatory stage of the proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments. Therefore, any additional amounts owed with respect to these fund contributions shall be calculated in the manner set forth in Merryweather Optical Co., 240 NLRB 1213 (1979).

still have been in need of their services and a measure of balanced bargaining power existed. Meaningful bargaining cannot be assured until some measure of economic strength is restored to the Union. A bargaining order alone, therefore, cannot serve as an adequate remedy for the unfair labor practices committed.

Accordingly, we deem it necessary, in order to effectuate the purposes of the Act, to require the Respondents to bargain with the Union, on request, about the effects of the closure on the unit employees, and shall accompany our order with a limited backpay requirement designed both to make the employees whole for losses suffered as a result of the Respondents' failure to bargain, and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondents. We shall do so in this case by requiring that the Respondents pay backpay to unit employees in a manner similar to that required in Transmarine Corp., 170 NLRB 389 (1968). The Respondents shall pay unit employees backpay at the rate of their normal wages when last in the Respondents' employ from 5 days after the date of this Decision and Order until the occurrence of the earliest of the following conditions: (1) The date the Respondents bargain to agreement with the Union on those subjects pertaining to the effects of the plant closure on unit employees; (2) a bona fide impasse in bargaining; (3) the failure of the Union to request bargaining within 5 days of the date of this Decision and Order, or to commence negotiations within the 5 days of the Respondents' notice of its desire to bargain with the Union; or (4) the subsequent failure of the Union to bargain in good faith.

In no event shall the sum paid to any of these employees exceed the amount they would have earned as wages from the date on which the Respondents

terminated their operations to the time they secured equivalent employment elsewhere, or the date on which the Respondents shall have offered to bargain, whichever occurs sooner; provided, however, that in no event shall this sum be less than the amount these employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondents' employ.

ORDER

The National Labor Relations Board orders that the Respondents, Kingsway Purchasing, Inc., Electro-King, Inc., and H.P.A., Inc., Detroit, Michigan, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discontinuing contributions on behalf of the unit employees to the Amalgamated Department Store and Retail Employees Retirement Income Plan.

(b) Discontinuing contributions on behalf of the unit employees to the Amalgamated Department Store and Retail Employees Insurance Fund and the Amalgamated Social Benefits Association.

(c) Ceasing to remit dues and initiation fees withheld from employees' pay to the Union.

(d) Closing their stores without prior notice to the Amalgamated Clothing and Textile Workers International Union, AFL--CIO without affording the Union an opportunity to bargain as the exclusive representative of the unit employees with respect to the effects of the closings on the unit employees at a time when bargaining could have been meaningful. The appropriate unit is:

> All full-time and regular part-time employees, employed by the Respondents at their Warren, Grand River/Greenfield and Grand River/Oakman stores, including employees in all leased and licensed departments within these stores; but excluding store managers, assistant store managers, office managers, receiving and marking room managers, management trainees, professional employees, guards and supervisors as defined in the Act.

(e) Failing and refusing to pay contractually mandated pro rata vacation, sick days, and personal days to the unit employees at the Warren store, the Greenfield store, and the Oakman store.

(f) Failing and refusing to pay contractually mandated severance benefits to the unit employees since about May 7, 1990.

(g) Failing and refusing to furnish the Union with the requested information.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole the Amalgamated Department Store and Retail Employees Retirement Income Plan for the Respondents' failure to make contributions on behalf of the unit employees.

(b) Make whole the Amalgamated Department Store and Retail Employees Insurance Fund and the Amalgamated Social Benefits Association for the Respondents' failure to make contributions on behalf of the unit employees.

(c) Make whole the Union for the Respondents' failure to remit the union dues and initiation fees withheld from the checks of unit employees in accordance with dues-checkoff authorizations, with interest.

(d) Make whole the unit employees by payment to each employee their pro rata vacation, sick days, and personal days, with interest.

(e) Make whole the unit employees by payment to each employee of their severance benefits, with interest.

(f) Furnish the Union with the requested information.

(g) On request, bargain in good faith with the Union as the exclusive representative of the unit employees regarding the effects of the closings of the Warren, Greenfield, and Oakman stores, and pay the employees limited backpay in the manner set forth in the remedy section of this Decision and Order.

(h) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary or useful to ensure compliance with this Order.

(i) Post at its facilities in Detroit, Michigan, copies of the attached notice marked ''Appendix.''[4] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondents' authorized representative, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(j) Mail a copy of the attached notice marked ''Appendix'' to all employees who were employed by the Respondents prior to the store closings. Copies of the Notice, on forms provided by the Regional Director, after being signed by the Respondents' authorized representative, shall be mailed immediately upon receipt.

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[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD'' shall read ''POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.''

(k) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents have taken to comply.

Dated, Washington, D.C. January 31, 1991

Dennis M. Devaney, Member

Clifford R. Oviatt, Jr., Member

John N. Raudabaugh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discontinue contributions made on your behalf to the Amalgamated Department Store and Retail Employees Retirement Income Plan.

WE WILL NOT discontinue contributions made on your behalf to the Amalgamated Department Store and Retail Employees Insurance Fund and the Amalgamated Social Benefits Association.

WE WILL NOT fail to remit to the Union dues and initiation fees withheld from your paychecks.

WE WILL NOT close our stores without prior notice to Amalgamated Clothing and Textile Workers International Union, AFL--CIO, as the exclusive representative of all employees in the appropriate unit and WE WILL NOT fail and refuse to bargain collectively with the Union about the effects of the store closings on unit employees. The appropriate unit is:

> All full-time and regular part-time employees, employed by the Respondents at their Warren, Grand River/Greenfield and Grand River/Oakman stores, including employees in all leased and licensed departments within these stores; but excluding store managers, assistant store managers, office managers, receiving and marking room managers, management trainees, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT fail and refuse to pay contractually mandated pro rata vacation, sick days, and personal days to the employees at the Warren store, the Grand River/Greenfield store, and the Grand River/Oakman store.

WE WILL NOT fail and refuse to pay contractually mandated severance benefits to you.

WE WILL NOT fail and refuse to furnish the Union with the requested information.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole the Amalgamated Department Store and Retail Employees Retirement Income Plan for our failure to make pension contributions on your behalf.

WE WILL make whole the Amalgamated Department Store and Retail Employees Insurance Fund and the Amalgamated Social Benefits Association for our failure to make health and sickness contributions on your behalf.

WE WILL make whole the Union for our failure to remit the union dues and initiation fees we withheld from your paychecks, in accordance with dues-checkoff authorizations.

WE WILL make whole the unit employees by payment to each employee of his or her pro rata vacation, and sick days, and personal days.

WE WILL make whole the unit employees by payment to each employee of his or her severance benefits.

WE WILL furnish the Union with the requested information.

WE WILL, on request, bargain collectively with the Union with respect to the effects of closing the stores upon the employees in the above-described unit.

WE WILL pay the employees who were employed at the stores, on the date of their respective closings, their normal wages for a period of time as required in the Decision and Order of the National Labor Relations Board.

KINGSWAY PURCHASING, INC.
ELECTRO-KING, INC.
H.P.A., INC.

(Employers)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 477 Michigan Avenue, Room 300, Detroit, Michigan 48226-2569, Telephone 313--226--3219.